STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
September 23, 2010

In the Matter of M. J. PEOPLES, Minor.

No. 296100
Wayne Circuit Court
Family Division
LC No. 09-488813-NA

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

Respondent father appeals as of right from an order terminating his parental rights to the child pursuant to MCL 712A.19b(3)(g) and (j). The parental rights of the child's mother were also terminated, but she is not participating in this appeal. We affirm.

The Department of Human Services (DHS) filed a permanent custody petition, alleging that the child had tested positive for cocaine at his birth. The mother admitted to drug use and had a prior termination. The father had a prior conviction for drug trafficking and was on parole. He was unemployed. The father indicated a desire to plan for the child with the mother. Given the mother's history and the father's inability to care for the child, DHS sought termination at original disposition and did not offer services.

The father argues that the trial court erred in terminating his parental rights. We disagree and find that the trial court did not clearly err in finding that the statutory grounds for termination of the father's parental rights were established by clear and convincing evidence. *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000).

The father complains that the trial court relied heavily on the negative testimony of his mother, W. Peoples, with whom the child was placed; however, the father's testimony alone provided sufficient evidence to terminate his parental rights. He made numerous admissions regarding his criminal and employment histories. The father was convicted of a drug crime in 2007 and spent a year in prison before being paroled in August 2008. Although he denied using drugs himself, he could not separate himself from the drug world, as evidenced by two separate incidents following the child's birth in the summer of 2009. On one occasion, the father admitted that he was in W. Peoples's garage rolling marijuana joints. He was quick to point out that it was not his marijuana and that he was not smoking it. Still, his behavior was at odds with his testimony that he was ready and willing to provide for the child and commit to a life free of drugs and crime. The child was placed with respondent's mother, yet the father possessed drugs in his mother's garage with the child inside of the home. Instead of spending his time with his

son, the father was engaged in illicit activity. In addition to the incident in the garage, the father was arrested two weeks later when he was driving in a car with two other individuals after curfew. The other individuals had cocaine in their possession. The father testified that he had not been convicted of a crime for "almost three years now. . . . That is the longest that I have been in my life." He was 41 years old. His testimony speaks for itself. The child would be at risk of harm if returned to the father's care based on the father's criminal history.[1]

As for being able to provide for the child, the father testified that it was not simply the child's maternal and paternal grandmothers that provided baby supplies. He borrowed a number of items from a friend whose wife had a recent miscarriage. He also testified that the child's mother qualified for WIC. He admitted, however, that W. Peoples probably spent over $800 on other necessities, such as a crib. Not surprisingly, the father offered absolutely no testimony regarding what *he* provided the child. This is likely due to the father's lack of legal employment. The father testified that, contrary to his mother's testimony, he had several jobs throughout his life, including nine months with Grey Hall Technology in the late 1990's. However, for a 41-year-old man, a nine-month period of employment from more than ten years ago is hardly impressive. He claimed that he worked under the table because his lack of a birth certificate prevented him from obtaining legal employment. Instead of taking responsibility for obtaining his birth certificate, the father blamed his mother for not helping him more.

The father was incarcerated and did not have housing or employment. His plan for the child was to, "Get out. Stay out. Find a job. Keep a job." This was hardly a concrete plan. There was simply no way of knowing exactly when the father would be released and how long it would take for him to become stable thereafter. The father complains that DHS should have offered services, but he does not state what services would have facilitated reunification. In light of his admitted history of criminality and unemployment, it did not appear likely that he would ever be in a position to care for the child.

Having found the statutory grounds for termination proven by clear and convincing evidence, the trial court also had to determine whether termination of the father's parental rights was in the child's best interests. MCL 712A.19b(5). The father argues that he was denied the right to present "best interests" evidence because there was no separate hearing. However, the father fails to allege that he was denied the opportunity to present his case. Additionally, the father fails to make an offer of proof as to what he would have presented had he been given the opportunity. The child was never in the father's care and the father visited the child sporadically before his incarceration. The child was a newborn when the father went to jail, so there was no appreciable bond. Given the father's incarceration, history of criminality, and unemployment, he was not in a position to care for the child. The child had been with his paternal grandmother since birth. He was enjoying a stable life and was entitled to permanence.

[1] Unlike the situation recently addressed by our Supreme Court in *In re Mason*, 486 Mich 142, 154; 782 NW2d 747 (2010), respondent was provided "the opportunity to participate in the proceedings" to terminate his parental rights. Further, unlike the situation in that case, the court in the present case did not find grounds for termination due almost entirely on respondent's incarceration at the time of the termination hearing.

The father next argues that he was denied the effective assistance of counsel because his attorney's cross-examination of W. Peoples elicited more damaging testimony. The father failed to file a motion for a new trial or request a hearing in the trial court, as required by *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973). Therefore, his allegation of ineffective assistance of counsel has not been preserved for appellate review, and review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

The right to counsel guaranteed by the United States Constitution, US Const, Am VI, applies to child protective proceedings, and the principles of effective assistance of counsel developed in the context of criminal law apply by analogy in termination of parental rights proceedings. *In re Powers*, 244 Mich App 111, 121; 624 NW2d 472 (2000). Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Odom*, 276 Mich App 407; 740 NW2d 557 (2007). Effective assistance of counsel is presumed, and a respondent bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). This Court will not substitute its judgment for counsel on matters of trial strategy, including the questioning of witnesses.

During cross-examination, the father's attorney elicited testimony from W. Peoples that there were at least two other individuals in the garage at the time of the marijuana incident. Peoples testified that when the police officers arrived they told her that they were already watching her house. Peoples also testified that she found marijuana growing in the garage on a different occasion. When respondent's counsel asked Peoples whether she ever attempted to get counseling for the father, she testified that she had but that it did not work. Counsel then asked Peoples whether she had been to the apartment that the father shared with the child's mother. She testified, "You want me to say? It just had a blow up bed." Counsel asked about how the visits went. Peoples testified that the father would hold the child, but he never changed a diaper and he "was never with him that long." When the father's attorney asked Peoples whether the father had a history of being inappropriate with children, she said, "Yeah, I could probably – but I don't – it hasn't – I could bring somebody in here that could tell you that but I – you know."

The father was not denied the effective assistance of counsel. W. Peoples's most damaging testimony came during direct examination and over counsel's objection. She testified with regard to the father's lengthy criminal history and lack of legal employment. As mentioned above, the father's testimony was quite similar to that offered by Peoples. The father's attorney did her best under the circumstances. She subjected Peoples to a lengthy cross-examination and certainly demonstrated the strained relationship between Peoples and her son in an attempt to discredit some of Peoples's statements. There is simply nothing in the record to support the father's contention that counsel's behavior fell below an objective standard of reasonableness.

Additionally, the father is unable to demonstrate that the results of the proceedings would have been any different had counsel acted differently. As discussed above, the evidence supporting termination was clear and convincing. The father was incarcerated, had an extensive criminal history, and had no legal source of income. He had no ability to care for the child.

Counsel advocated zealously for her client.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Jane M. Beckering